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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/509,806

10/28/2004

Bernhard Meyer

1981USWO

8347

43896

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06/22/2007

ECOLAB INC.

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EAGAN, MN 55121

EXAMINER

DELCOTTO, GREGORY R

ART UNIT

PAPER NUMBER

1751

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DELIVERY MODE

06/22/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/509,806

Applicant(s)

MEYER ET AL.

Examiner

Gregory R. Del Cotto

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1751

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on RCE filed 12/8/06.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 10-26 is/are pending in the application.
- 4a) Of the above claim(s) 10-16 and 25 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 17-24 and 26 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☒ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

1. Claims 1-9 are canceled. Claims 10-26 are pending. Applicant's amendments and arguments filed 4/16/07 have been entered.

Claims 10-16 and 25 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on 7/24/06.

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 12/8/06 has been entered.

Priority

Receipt is acknowledged of papers submitted under 35 U.S.C. 119(a)-(d), which papers have been placed of record in the file.

Objections/Rejections Withdrawn

The following objections/rejections as set forth in the Office action mailed 10/4/06 have been withdrawn:

None.

Claim Rejections - 35 USC § 102

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The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

Claims 17-24 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO98/25468 (Biering et al (US 6,540,960)) in view of Lang et al (US 5,858,945) or WO02/22770 (Meine et al (US 7,186,675)).

Note that, Biering et al or Meine et al is a 371 application of WO98/25468 and WO02/22770, respectively, and have been used as a translation of '468 and '770, respectively, since, according to PCT rules, the 371 application and PCT application must be identical.

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Biering et al teach a process for disinfecting medical instruments involving reacting a hydrogen peroxide donor with an N-acyl compound in an aqueous medium having a pH of 9 to 11 to form an acylated hydrogen peroxide preparation. The process is effective against mycobacteria. See Abstract. Preferably, the composition is in powder form which is then dissolved in water and added to the substrate intended to be cleaned and disinfected. See column 4, lines 40-69. The powdered composition contains from 5 to 40% by weight of a solid inorganic percompound, from 5 to 30% of TAED, from 20 to 50% of sodium triphosphate, 0 to 15% of surfactant, and the balance to 100% of other auxiliaries. See column 5, lines 1-30. Suitable surfactants include nonionic and anionic surfactants and suitable nonionic surfactants include alcohols alkoxylated with ethylene oxide and a small quantity of propylene oxide. See column 4, lines 1-25.

Biering et al do not teach the use of the specific EO/PO surfactant or a method of disinfecting a surface using a composition which generates peracetic acid containing a peroxide, an acylating agent, specific nonionic surfactant, and the other requisite components of the composition in the specific amounts as recited by the instant claims.

Lang et al teach granules which incorporate citric acid monohydrate as an exotherm control agent within a peracid containing core. See Abstract. Suitable peroxides include alkyl peroxy acids, perborate monohydrate, percarbonate, etc. The oxygen bleaching agent is used in the compositions in amounts from 1 to 20% by weight. See column 3, lines 1-45. Additionally, peroxy peracid precursors for peroxy bleach compounds also may be used in the compositions and include TAED, etc., which

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may be used in amounts from 0.1 to 10% by weight. See column 5, line 1 to column 6, line 40. Surfactants may also be used in the compositions and include nonionic surfactants such as polyoxyethylene or polyoxypropylene condensates of aliphatic alcohols, having a linear or branched chain and unsaturated or saturated, containing from about 6 to about 24 carbon atoms and incorporating from about 2 to about 50 ethylene oxide and/or propylene oxide units, etc., and the amount of surfactant in the composition is in the range of from 0.5 to 20% by weight. See column 8, line 15 to column 9, line 20.

Meine et al teach a surfactant combination containing one or more alkyl ether sulfates, at least one quaternary ammonium compound, etc. See Abstract. The composition is used for cleaning hard surfaces including tableware and other hard surfaces such as glass, ceramic, plastic, or metal, in the home and in the institutional sector. See column 2, lines 55-69. Besides alkyl sulfates and/or amphoteric surfactants, the compositions may additionally contain one or more other anionic surfactants, nonionic surfactants, and/or cationic surfactants, especially to improve cleaning performance, drainage behavior, and/or drying behavior. See column 5, lines 5-20. Suitable nonionic surfactants include alkoxylates such as polyglycol ethers, block polymers of ethylene oxide and propylene oxide, etc. See column 13, lines 25-45. Note that, Dehydol 980 is used as a nonionic surfactant which is the same as the preferred nonionic surfactant having the specific alkyl distribution listed on page 5, lines 25-30 of the instant specification. See column 23, lines 10-35.

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It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to use the specific EO/PO surfactant in the composition taught by Biering et al, with a reasonable expectation of success, because Lang et al or Meine et al teach the use of the specific EO/PO surfactants in a similar hard surface cleaning composition composition and further, Biering et al teach the use of nonionic surfactants having ethylene oxide and propylene oxide groups in general.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to disinfect a surface using a composition which generates peracetic acid containing a peroxide, an acylating agent, specific nonionic surfactant, and the other requisite components of the composition in the specific amounts as recited by the instant claims, with a reasonable expectation of success and similar results with respect to other disclosed components, because the broad teachings of Biering et al in combination with Lang et al or Meine et al suggest a method of disinfecting a surface using a composition which generates peracetic acid containing a peroxide, an acylating agent, specific nonionic surfactant, and the other requisite components of the composition in the specific amounts as recited by the instant claims. Additionally, the Examiner asserts that the teachings of Biering et al in combination with Lang et al or Meine et al would suggest compositions having the same disinfectant properties as recited by the instant claims because Biering et al in combination with Lang et al or Meine et al teach compositions containing the same components in the same proportions as recited by the instant claims.

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Claims 17-24 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO01/47565 (Biering et al (US 6,908,891)) in view of Lang et al (US 5,858,945) or WO02/22770 (Meine et al (US 7,186,675)).

Note that, Biering et al or Meine et al is a 371 application of WO01/47565 and WO02/22770, respectively, and have been used as a translation of '565 and '770 since, according to PCT rules, the 371 application and PCT application must be identical.

Biering et al teach the use of agents, which contain at least one disinfection system based on selected organic peracids and combinations of peracids, in automatically functioning systems, in which fragile medical appliances, in particular, endoscopes, are cleaned and disinfected. See Abstract. The disinfecting system contains organic peracids, at least one fatty acid, at least one hydrotrope, at least one surfactant and/or at least one complexing component. See column 4, line 30 to column 5, line 15. Additionally, the hydrogen peroxide may be reacted with a N-carboxylic acid amide such as N-acylcaprolactam or TAED to generate the peracetic acid. See column 5, lines 1-60. Suitable surfactants include alkoxylated alkyl alcohols containing 8 to 22 carbon atoms wherein the alkoxy component is mixed ethoxylated or propoxylates. See column 7, lines 1-50.

Note that, with respect to claim 17, this claim is a process claim which contains a product-by-process limitation within the process claim that does not further limit the process and has not been read as a claim limitation; specifically, the product-by process limitation is forming a peracetic acid use solution by dissolving a powder in water wherein the powder contains certain bleaching constituents. Note that, even though

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product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. See MPEP 2113. The Examiner maintains that Biering et al teach a process of cleaning/disinfecting medical instruments by using a peracetic acid use composition as recited by the instant claims.

Biering et al do not teach the use of the specific EO/PO surfactant or a method of disinfecting a surface using a composition which generates peracetic acid containing a peroxide, an acylating agent, specific nonionic surfactant, and the other requisite components of the composition in the specific amounts as recited by the instant claims.

Lang et al and Meine et al are relied upon as set forth above.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to use the specific EO/PO surfactant in the composition taught by Biering et al, with a reasonable expectation of success, because Lang et al or Meine et al teach the use of the specific EO/PO surfactants in a similar hard surface cleaning composition composition and further, Biering et al teach the use of nonionic surfactants having ethylene oxide and propylene oxide groups in general.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to disinfect a surface using a composition which generates peracetic acid containing a peroxide, an acylating agent, specific nonionic surfactant, and the other requisite components of the composition in the specific amounts as

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recited by the instant claims, with a reasonable expectation of success and similar results with respect to other disclosed components, because the broad teachings of Biering et al in combination with Lang et al or Meine et al suggest a method of disinfecting a surface using a composition which generates peracetic acid containing a peroxide, an acylating agent, specific nonionic surfactant, and the other requisite components of the composition in the specific amounts as recited by the instant claims. Additionally, the Examiner asserts that the teachings of Biering et al or Meine et al in combination with Lang et al would suggest compositions having the same disinfectant properties as recited by the instant claims because Biering et al in combination with Lang et al or Meine et al teach compositions containing the same components in the same proportions as recited by the instant claims.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

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Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 17-24 and 26 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-21 of U.S. Patent No. 6,540,960 in view of Lang et al (US 5,858,945) or WO02/22770 (Meine et al - US 7,186,675).

Claims 1-21 of US 6,540,960 encompass all the material limitations of the instant claims except for the inclusion of the specific EO/PO surfactant in addition to the other requisite components of the composition as recited by the instant claims.

Lang et al and '770 are relied upon as set forth above.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to use the specific EO/PO surfactant in the composition taught by claimed by '960, with a reasonable expectation of success, because Lang et al or '770 teaches the use of the specific EO/PO surfactants in a similar hard surface cleaning composition composition and further, '960 claims the use of surfactants in general.

Claims 17-24 and 26 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-20 of U.S. Patent No. 6,908,891 in view of Lang et al (US 5,858,945) or WO02/22770 (Meine et al - US 7,186,675).

Claims 1-20 of US Pat. 6,908,891 encompass all the material limitations of the instant claims except for the inclusion of the specific EO/PO surfactant in addition to the other requisite components of the composition as recited by the instant claims.

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Lang et al or '770 are relied upon as set forth above.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to use the specific EO/PO surfactant in the composition taught by claimed by '891, with a reasonable expectation of success, because Lang et al or '770 teach the use of the specific EO/PO surfactants in a similar hard surface cleaning composition composition and further, '891 claims the use of surfactants in general.

Claims 17-24 and 26 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-21 of copending Application No. 10/945816 in view of Lang et al (US 5,858,945) or WO02/22770 (Meine et al - US 7,186,675).

Claims 1-5, 7, 10, 11, 13-16, and 18-24 of 10/945816 encompass all the material limitations of the instant claims except for the inclusion of the specific EO/PO surfactant in addition to the other requisite components of the composition as recited by the instant claims.

Lang et al or '770 are relied upon as set forth above.

It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to use the specific EO/PO surfactant in the composition taught by claimed by '816, with a reasonable expectation of success, because Lang et al or '770 teach the use of the specific EO/PO surfactants in a similar hard surface cleaning composition composition and further, '816 claims the use of surfactants in general.

This is a provisional obviousness-type double patenting rejection.

Response to Arguments

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With respect to the rejection of the instant claims under 35 USC 103 using WO98/25468 in view of Lang et al or WO01/47565 in view of Lang et al, Applicant states that they respectfully disagree with the characterization of the claims as product-by-process and that the claimed embodiments of the invention are directed to improved peracid-generating powders and their use in making improved peracid solutions for disinfecting surfaces. In response, note that, the Examiner maintains that '468 (US 6,540,960) clearly suggests mixing a powdered composition with water to form a diluted cleaning composition, followed by contacting medical instruments with the diluted use composition to disinfect/clean the instruments which is the same process as recited by the instant claims. See column 4, lines 35-69 of '960. Additionally, with respect to instant claim 17, the Examiner maintains that this claim is a process claim which contains a product-by-process limitation within the process claim that does not further limit the process of cleaning and has not been read as a claim limitation; specifically, the product-by process limitation is forming a peracetic acid use solution by dissolving a powder in water wherein the powder contains certain bleaching constituents. Note that, even though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. See MPEP 2113. Thus, the Examiner maintains that Biering et al teach a process of

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cleaning/disinfecting medical instruments by using a peracetic acid use composition as recited by the instant claims.

With respect to the rejection of the instant claims under 35 USC 103(a) under Biering et al in combination with Lang et al, Applicant states that the present invention is distinguished from Lang et al. Further, Applicant states that while Lang et al teaches EO/PO surfactants with 6 to 24 carbon atoms and 2 to 50 EO/PO units, it does not teach the preferred distribution of R groups as called out in claim 17 which is important for the improved dissolution rate and disinfectant properties as shown in Examples 1 and 2 of the present application. In response, note that, Lang et al is a secondary reference relied upon for its teaching of a particular nonionic surfactants. The Examiner maintains, as stated previously, that one of ordinary skill in the art clearly would have been motivated to use the nonionic surfactants as taught by Lang et al in the cleaning compositions taught by Biering et al, with a reasonable expectation of success, because Lang et al teach the use of the specific EO/PO surfactants in a similar hard surface cleaning composition composition and further, Biering et al teach the use of nonionic surfactants having ethylene oxide and propylene oxide groups in general. Note that, with respect to the data presented in Examples 1 and 2 of the instant specification, the Examiner asserts that the data is not sufficient to overcome the prior art rejections under 35 USC 103(a) as set forth above.

First, note that, the data presented in Examples 1 and 2 is not commensurate in scope with the claimed invention. For example, the instant claims are open to any amount of peroxide agent and any amount of nonionic surfactant while the data shows

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only one specific embodiment containing a specific amount of bleach and nonionic surfactant which is not commensurate in scope with the instant claims. Additionally, while embodiments 1a)-1c) are presented in Examples 1 and 2 of the specification with embodiment 1c) appearing to fall within the scope of the instant claims, it is not clear from the data how each of these embodiments differs from each other and therefore, it is not clear what is being compared. Thus, the Examiner asserts that since the data presented in the specification is not clear, an objective determination cannot be made, and the data is not sufficient to place the instant claims in condition for allowance.

Conclusion

2. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Remaining references cited but not relied upon are considered to be cumulative to or less pertinent than those relied upon or discussed above.

Applicant is reminded that any evidence to be presented in accordance with 37 CFR 1.131 or 1.132 should be submitted before final rejection in order to be considered timely.


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Gregory R. Del Cotto whose telephone number is (571) 272-1312. The examiner can normally be reached on Mon. thru Fri. from 8:30 AM to 6:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Douglas McGinty can be reached on (571) 272-1029. The fax phone

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number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Gregory R. Del Cotto
Primary Examiner
Art Unit 1751

GRD
June 20, 2007